In The United States Circuit Court of Appeals

IN AND FOR THE NINTH CIRCUIT

MARGARET ROSBOROUGH and ALICE BARBEE WICK,
Appellants
vs.
CHELAN COUNTY, WASHINGTON, a municipal corporation,
Appellee
No. 6429

ALICE BARBEE WICK, ,
THEODORE S. TETTEMER and JANE DOE TETTEMER, his wife, (true Christian name unknown)
Appellants
vs.
CHELAN COUNTY, WASHINGTON, a municipal corporation
Appellee
No. 6430

BRIEF FOR APPELLANTS

Upon appeal from the United States District Court for the Eastern District of Washington, Northern Division.

BERKEY & COWAN
204-6 Wall St. Bank Bldg.
Spokane, Washington
Attorneys for Appellants

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STATEMENT OF THE CASE

The two causes above-entitled were appealed from the District Court of the United States for the Eastern District of Washington, Northern Division, from the verdicts of a jury awarding damages, the judgments thereon and decrees of appropriation entered December 15, 1930, and from the whole thereof.

Under the stipulation of counsel on file, both causes will be heard together and briefs in the one case shall be considered in both without printing and filing separate briefs. (1st case—R. 131) (2d case —R. 139)

Full records have been made up and printed and separate findings and judgment will be asked in each case.

The records are alike in both cases except as to the parties and the land involved. For this reason references to the record refer to the cause first above, unless otherwise stated.

The appellants in the respective causes are all citizens of Pennsylvania and reside in Philadelphia, (1st case—R. 15-16); (2d case—R. 17-18). They made no appearance at the trials either in person or by attorney.

The controversies arose over the attempt of the County Commissioners of Chelan County, Washington, to establish a road along the southerly shore of Lake Chelan to be known as the "Change in South Lake Shore Extension Road", and for that purpose to condemn and take lands of these appellants under eminent domain. The situation and the proposed road are illustrated by the county engineer's maps in evidence as "Exhibit No. 4" and "Exhibit No. 5".

The proceedings to establish and condemn the road were an attempted compliance with Chapter 173, Session Laws of Washington, 1925, Remington's Comp. Stat. (1927 Supp.) Sec. 6447; (Pierce's Code Sec. 5992) and the eminent domain statutes of Washington, Remington's Comp. Stat. (1922) Secs. 921-929; (Pierce's Code, Sec. 7646-7655). The act and the Statutes are fully set forth in the Appendix.

The essential provisions of Chap. 173, L '25, are that county roads shall be established only as therein provided. The Board of County Commissioners by unanimous resolution entered in the minutes may declare its intention to lay out, establish or widen any county road and that same is a public necessity and direct the county engineer to report on the project. 2 Rem. Comp. Stat. (Sec. 6447-1)

Whenever directed, the County Engineer shall make an examination of the proposed route, and if

he deems it practicable, shall make a survey thereof, and report in writing to the Board, giving his opinion as to the necessity, terminals, length, width, cost and other important facts. He must also file a correct map of the survey with field notes and profiles. 2 Rem. Comp. Stat. (Sec. 6447-3)

The Board must then fix a time and place for hearing on the engineer's report, and give notice thereof by publication once each week for three successive weeks, and post same for 20 days at each of the termini. Such notice shall set forth the termini and width as recommended in the report, and that all persons interested may appear and be heard. On the day of hearing, upon satisfactory proof of the publication and posting of the notices, if the Board finds the road a necessity, it may then establish the same by resolution or order. 2 Rem. Comp. Stat. (Sec. 6447-4)

The County Engineer must then cause stone monuments to be placed at the termini. 2 Rem. Comp. Stat. Sec. 6447-4)

When directed by the Board, the Prosecuting Attorney must proceed under eminent domain to acquire such lands as may be necessary for such highway purposes. 2 Rem. Comp. Stat. (Sec. 6447-5)

The essential provisions of the Eminent Domain statutes of Washington (Remington's Comp. Stat.

Sec. 921-929) (Pierce's Code Sec. 7646-7655); are:

(Sec. 921) Any corporation authorized by law to appropriate land may present to the Superior Court in the county where the land lies, a petition which describes the land sought with *reasonable certainty*, setting forth the names of the owners, the object of the taking and praying for a jury to determine the just compensation.

(Sec. 922) A Notice, setting forth the object of the petition, a description of the land, and the time and place for presenting the petition to the Court. This Notice must be served on each owner named, at least ten days before the time in the notice set for hearing. The service must be made by delivering a copy of the notice to each owner who is resident of Washington, at his usual abode, or, if non-resident, or residence unknown, upon affidavit to that effect, service may be made by publication in any newspaper in the county once a week for two successive weeks, and such publication shall be deemed service upon each such non-resident. Proof of publication shall be made by affidavit filed with the clerk. Want of service of notice shall render the subsequent proceedings void as to the person not served.

(Sec. 925) At the hearing of the petition for condemnation upon proof of service of the Notice, and that the purpose contemplated is really a necessary

public use, the court may make a recorded order to the sheriff to summon a jury.

(Sec. 926) At such trial the jury shall ascertain, determine and award the amount of damages to be paid to each owner or owners respectively, irrespective of benefits, and upon the verdict of the jury judgment shall be entered for the amount of the damages awarded to such owner or owners respectively for the taking or injuriously affecting such land.

(Sec. 927) At the time of judgment for damages, whether upon default or trial, if the damages be then paid, or if not so paid then upon their payment, the Court shall enter a judgment or decree of appropriation of the right of way, thereby vesting the legal title in the corporation seeking same. A certified copy of such judgment or decree of appropriation shall be recorded in the deed records in the county and with like effect. If the title is found defective, the corporation may again institute the proceedings.

(Sec. 929) On entry of judgment upon the verdict of the jury, awarding damages, the petitioner may make payment thereof to the parties entitled, together with costs, by depositing same with the Clerk of Court to be paid out under direction of the Court or Judge thereof, and upon making such payment into court the petitioner shall be released from

all further liability. In case of appeal the money to remain in court until final determination.

STATEMENT OF FACTS

In attempted and pretended compliance with these provisions on Oct. 30, 1928, the County Commissioners passed a Resolution of intention to lay out and establish a "county road along the southerly shore of Lake Chelan in said County to be known as the Change in South Lake Shore Extension Road, beginning at an interior point in Lot 3 of Sec. 3, Twp. 27 N., R. 21, E. W. M. at survey station 420 plus 96.5 of South Lake Shore Road as established and of record, and ending at survey station 488 plus 00.9 (an inter-section with Twenty-five Mile Creek Road) in SW¼ NE¼ Sec. 4" in the same township and range, and directing the county engineer to make an examination and survey and report in writing to the Board. (R. 56-57)

The County Engineer on the same day that this Resolution was passed, filed a written report, field notes and map of a pretended survey. His certificates show that the survey was not made "when directed" but about four months prior thereto, namely, "April 27, 28, May 12, 21, 22, and June 22 and July 3, 1928" (R. 63 and R. 78)

On Nov. 2, 1928, an affidavit of one Larner certifies that on the day previous he had posted notices

of the hearing of the report of the engineer in the matter of the Resolution of County Commissioners et al for a county road to be known as So. Lake Shore Extension Road, as follows: "One notice on 4" pine tree 10 ft. to right of Sta. 422 plus 25; one notice on 5" pine tree 5 ft. to left of Sta. 449 plus 10; one notice on 4" pine tree 5 ft. to left of Sta. 487 plus 55." The affidavit does not state the location of the notices in either the section, township, range, county or state where in the land was situated. (R. 85)

On Nov. 22, 1928, one D. R. Stohl, principal clerk of the Wenatchee Daily World, made an affidavit that he had published a notice, thereto attached, of the place and time of the hearing, namely, Nov. 23, 1928. The affidavit states that the notice was published for 4 consecutive weeks but it disputes itself by showing it was first published on Nov. 1st and last on Nov. 22d, 1928, only 3 weeks. (R. 86-87)

Attached to the affidavit is a purported copy of the said Notice, in which the hearing is set for Nov. 23, 1928, three weeks after the first publication. This published notice of hearing on the engineer's report does not describe the land over which the road is to be built in such manner that an ordinarily well informed owner could know, without the aid of a surveyor, whether or not his land was effected. No other notice was ever given of the hearing, none was ever sent to appellants in Pennsylvania and none of

them appeared at the hearing. (R. 87-89)

On Nov. 23, 1928, the day set for the hearing, the Board of County Commissioners made an Order establishing the road 60 feet wide and as shown by the engineer's map, and stating the names of the owners. It did not direct the prosecuting attorney to commence condemnation. (R. 89-92)

After the Order of Establishment of the road, the second phase of the proceedings was entered, namely, for condemnation of the land subject to the established road. On January 5, 1929, the prosecuting attorney filed two suits in the Superior Court of Washington for Chelan County. The County was petitioner. The respondents were the appellants, respectively, in the two cases now before this Court. (1st case—R. 6-11) (2d case—R. 6-13)

The Petitions need not be here set out. They described the land to be condemned by metes and bounds. These descriptions are set out in the appendix. The descriptions were erroneous in both cases. In neither Petition does the center line of the road coincide with the center line as established by the Order of the County Commissioners.

On the same day suits were filed, Notices in condemnation were prepared by the prosecuting attorney and filed, in pretended and attempted com-

pliance with the condemnation law. The Notices were addressed to the respondents in the suits and set forth a statement of the establishment of the road. They also contained a purported description of the land to be taken. These descriptions are identical with those set forth in the Petitions in condemnation. They are therefore erroneous in both cases. They do not contain a description of the land to be taken. They describe land partly under the waters of Lake Chelan and not the same land covered by the Commissioners' Order of Establishment. (1st. case—R. 1-5); (2d case—R. 1-6).

On the same day also affidavits for publication were made and filed by Sam M. Driver, deputy county prosecutor, that the respondents were all non-residents and resided in Pennsylvania (1st case—R. 12-13); (2d case—R. 14-15).

Affidavits of publication by the principal clerk of the owner of the Wenatchee Daily World, filed on Jan. 30, 1929, show that the Notices in condemnation were published once each week for 4 consecutive weeks but also state specifically that the notices were published "beginning on the 7 day of January, 1929 and ending on the 28 day of January, 1929, both inclusive". It appears therefore, that the Notices were published for 3 weeks. The exact dates of publication are not disclosed. (1st case—R. 24-25); (2d case—R. 27-28).

Meanwhile, on January 25, 1929, the respondents, appellants here, appeared *specially* in both condemnation suits for the purpose only of removing the causes to the United States District Court for the Eastern District of Washington, Northern Division, and showed that the amount in controversy in each case exceeded $3,000, and that respondents were residents and citizens of Pennsylvania, whereas the petitioner, Chelan County, was a resident of the State of Washington. (1st case—R. 15-21); (2d case—R. 17-24). On January 30, 1929, orders of removal were made by said Superior Court, removing both causes to said District Court of the United States. (1st case—R. 31-33); (2d case—R. 35-36).

Special appearances were preserved and retained in the Federal Court and objections made to the jurisdiction of the Court over the persons of the respondents or the subject matter of the actions, wrile Motions to Quash were argued and denied (1st case—R. 36-40) (2d case—R. 40-44), and Demurrers to the petitions (1st case—R. 40-41) (2d case—R. 44-45) and Motions to make more definite and certain or for bills of particulars (1st case—R. 42-45) (2d case—R. 46-49) were argued, overruled and denied. (1st case—R. 45-46) (2d case—R. 49-50); all during the year 1929.

On May 8, 1930, the county prosecutor made and filed in both cases a motion to set the case for trial.

These motions were based upon affidavits of Sam M. Driver, deputy prosecutor, that respondents had appeared specially in the causes by their attorney, J. D. Campbell of Spokane and that prior to Feb. 10, 1930, Mr. Campbell had died; that one Adrian W. Vollmer residing at Lakeside, Chelan County, Washington, had on July 6, 1928, written a letter to the county commissioners (Plaintiff's Exhibit No. 8) giving the Philadelphia address of two of the persons who were afterward named respondents in these cases, and that by reason of such communication purported to represent these respondents as their attorney. (1st case—R. 46-49) (2d case—R. 50-53) Copies of this motion and affidavit were mailed to respondents in Philadelphia and to Mr. Vollmer at Lakeside, Washington, marked "please forward if necessary". (1st case—R. 49-50) (2d case—R. 53-54).

Hearing of the cases for June 5, 1930 was ordered and a notice thereof mailed by the Clerk to respondents in Philadelphia on May 26, 1930, nine days before the hearing. Notices were also mailed by the Clerk to said Vollmer, designating him as respondents' attorney. (1st case—R. 52) (2d case—R. 56), The record shows that Mr. Vollmer was not and never had been attorney for the respondents, that he did not reside in the State of Washington and had not visited therein for over 23 months. (1st case—R. 53) (2d case—R. 58) No notices of any nature were ever

sent to him until after the death of respondents' attorney, Mr. Campbell.

On June 5, 1930, the cases came on for hearing on the question of public use and necessity. The respondents did not appear and were not represented by counsel. The matters were tried together on evidence presented by the petitioner. Among other things, petitioner introduced as "EXHIBIT NO. 1" what purported to be a certified copy of all the proceedings before the Board of County Commissioners, as proof of the legal establishment of the road. (R. 56-93) But the same was certified by the deputy auditor as clerk of the Board of County Commissioners and the seal of the auditor affixed, instead of having been signed by the Commissioners, attested by their clerk and sealed with the seal of the County Commissioners, as provided by law. (2 Remington's Comp. Statutes, Sec. 4069). (Pierce's Code, Sec. 1663)

To prove the ownership of the lands involved, testimony was given by Sam M. Driver, deputy prosecutor, that he had examined abstracts and the records in the auditor's office and found that the only persons having any interest in the lands were the parties respondent in these causes. No further proof of ownership was made. (Transcript of Evidence of Hearing June 5, 1930—pp. 11-12).

On June 23, 1930, the Court made and entered

Findings of Fact, Conclusions of Law and Order of Public Use and Necessity, in each case, that public interest required construction of the road mentioned in the petition, and the lands of the said respondents were necessary for the highway and the petitioner was entitled to the land for a right of way for highway purposes under the power of eminent domain upon the payment of just compensation to the respondents, and describing the right of way identically, including errors, as described in the petition and Notice in the condemnation suits. (1st case—R. 93-102) (2d case—R. 99-109)

Following, on Nov. 20, 1930, a jury trial was had in each cause and damages were awarded to the respondents of $700.00 (1st case R. 103) and $50.00 (2d case—R. 109). The respondents were not present nor were they represented by counsel at said trials.

On December 15, 1930, Judgments on the verdicts were entered in each case, and it was ordered that upon payment of just compensation and costs to the respondents, or into court for their benefit, the title should vest in Chelan County free and clear of all encumbrances of any nature whatsoever, and describing the land to be taken identically, including errors, as it was described in the petition and published notices in the condemnation suits. (1st case—R. 103-108) (2d case—R. 110-115).

On the same day, namely, Dec. 15, 1930, the Court entered Decrees of Appropriation in each case, and after finding that judgments for $700 and costs, and for $50 and costs, in the two cases respectively, had been entered in favor of respondents, and that the amounts thereof had been deposited with the Clerk to be paid out under the direction of the Court, it was ordered that there be vested in Chelan County, a right of way for highway purposes in the land, which was then described; that Chelan County be released from all liability to owners and all other claimants by reason of the taking of the road; that Chelan County be let into immediate possession, and that the sums of $730 and $80 be full compensation for the land. (1st case—R. 109-112) (2d case—R. 116-119).

But the descriptions in these Decrees of Appropriation show the same errors that were made in the original Petition and in the published Notices, and throughout the condemnation proceedings. The land described is not the land intended for the road. Also, although the decrees recite that the money had been deposited in court, the record of the Clerk shows that only warrants and not money had been deposited. (1st case—R. 108) (2d case—R. 115). The decrees were entered without any notice to the respondents, and before the money was paid to respondents, contrary to the provisions of 2 Remington's Comp. Statutes, Sec. 927 (Sec. 7652 Pierce's Code) and

contrary to Art. 1, Sec. 16 of the Constitution of the State of Washington.

After a motion by respondents for new trials which were denied, (1st case—R. 112-114) (2d case—R. 120-122), petitions and orders were filed for appeals to this Court. (1st case—R. 115-127) (2d case—R. 122-135).

ASSIGNMENTS OF ERROR

I.

1. That the Court has no jurisdiction over the persons or property of the respondents for the reason that the requirement of a once a week for two consecutive weeks' publication of notice against non-resident owners in condemnation proceedings, by Acts approved March 21, 1890, page 294, and being Section 7647 of Pierce's Code of the State of Washington, is inadequate and confiscatory and contrary to the Constitution of the United States, and particularly paragraph I of the 14th, Amendment thereof.

II.

1. That the notice of petitioner's motion to have said case set for trial on Monday, May 26th, 1930, at 10:00 o'clock A. M. was received by respondents by mail at Philadelphia, Pennsylvania, on May 23d,

1930, thereby giving respondents insufficient time to appear, or to be represented thereat.

2. That the only notice of hearing for order of necessity was by registered mail and not received by respondents at Philadelphia, Pennsylvania until May 31st, 1930, stating said cause had been set for hearing on June 5th, 1930, at 10:00 o'clock A. M. and did not give respondents sufficient time to appear and defend the same.

3. That notice of trial was likewise served upon respondents by mail, the same being received by respondents at Philadelphia, Pennsylvania, on November 3d, 1930, stating that said case had been set for trial on November 20th, 1930, at 10:00 o'clock A. M., which did not give respondents sufficient time to prepare for trial and defend said cause.

4. That said notices were also served upon one Adrian W. Vollmer, who was not an attorney of record for these respondents, or either of them, and who did not reside at Lakeside, Washington, as stated in said notices, and did not in anywise represent respondents.

III.

That the Court erred in denying respondents' motion to quash and in refusing to hold the following statutes of the State of Washington, void as depriv-

ing respondents (now appellants) of due process of law secured by Paragraph 1 of the Fourteenth Amendment of the Constitution of the United States, to-wit: Acts approved March 13th, 1899, Chapter 94, p. 147, particularly Section 1, p. 147; March 17th, 1903, Chapter 173, p. 360, particularly Section 2, p. 362; March 15, 1907, Chapter 159, p. 349, particularly Section 1, p. 349.

IV.

That the Court erred in denying appellants' motion to make more definite and certain, or in the alternative for a bill of particulars.

V.

That the Court erred in overruling appellants' demurrer.

VI.

1. That the Commissioners' proceedings, upon which the verdict and judgment are based, are fatally defective and incomplete as shown by the record in this case.

2. That no showing is made in said Commissioners' proceedings, or the surveyors' report that any offer or statements of damages was made to respondents, or either of them, prior to commencement of Condemnation Proceedings.

3. That it appears from Engineers' report, that the survey for the road was made on April 27th, and April 28, May 12, 21, 22, June 22 and July 3, 1928, which was prior to and not in pursuance of the order of the County Commissioners directing such survey on October 30th, 1928, and as required by Chapter 173, Laws of 1925, and more particularly Section 3 thereof, of the laws of the State of Washington.

4. That the Commissioners' proceedings do not show that the prosecuting attorney was ordered to commence condemnation proceedings as provided for by Chapter 173, of the Laws of 1925, and more particularly Section 5 thereof of the laws of the State of Washington.

5. That the Commissioners' proceedings were not signed and sealed by the County Commissioners, and attested by their Clerk, as required by Laws 1893, and on page 252 thereof, and approved March 10, 1893, and particularly Section 1663, of Pierce's Code of the State of Washington.

6. That the lands sought to be taken by the decree of appropriation are incorrectly described, and vary from the surveyor's plat and field notes thereof on file herein.

7. That the description of the lands sought to be taken by the condemnation proceedings and decree of appropriation differ from and are at variance

with the published notice of hearing on change on South Lake Shore Extension Road dated October 31, 1928.

8. That the award of damages was not paid in to the Clerk of the court prior to the entry of decree of appropriation, and as provided for therein, and contrary to the provisions of Article 1, Section 16 of the Constitution of the State of Washington.

9. That no segregation or separate statement of damages was made to respondents in the verdict or judgment thereon for their respective lands taken or damaged.

VII.

That the Court erred in entering a judgment on the verdict which purports to convey the fee to the road in question, rather than an easement for road purposes, as authorized by the provisions of Chapter 173 of the Laws of 1925, approved Jan. 15, 1926.

VIII.

That the Court erred in refusing respondents' motion to quash and to set aside the pretended notice of filing and of hearing of the petition in condemnation; said motion being upon the ground, inter alia, that the condemnation statutes of the State of Washington, upon which these condemnations proceedings were based, particularly that portion thereof (Ses-

sion Laws of 1890, p. 295, Sec. 2, Pierce's Code, Section 7646) relating to notice and service upon non-resident owners is inadequate as to manner and time and without due process of law, and is thus and otherwise contrary to Sections 3 and 16 of Article 1, of the Constitution of the State of Washington, and the Fourteenth Amendment to the Constitution of the United States.

IX.

That the Court erred in refusing to hold that certain eminent domain statute of the State of Washington, entitled an Act to regulate the mode of proceeding to appropriate lands by Corporations, approved March 21, 1890, Laws of 1890, p. 294, and laws amendatory thereof, are contrary to Sections 2, 3 and 16 of Article 1 of the Constitution of the State of Washington, and Section 2, Article IV, and the Fourteenth Amendment of the Constitution of the United States.

X.

That the Court erred in refusing to hold that the eminent domain statutes of the State of Washington are contrary to the provisions of the Constitution of the State of Washington; and the Constitution of the United States, and the amendments thereto, and deny to these respondents their constitutional rights guaranteed to them thereunder.

XI.

That the Court erred in holding that the taking of respondents' lands was for a public use and the entering of an order of necessity therein and the same is contrary to respondents' rights under the Fourteenth Amendment of the Constitution of the United States.

XII.

That there is nothing in the record of the above-entitled cause, showing that jurisdiction was acquired over respondent, Alice Barbee Wick, either by personal service, or by description of any property belonging to her.

XIII.

That the Court erred in refusing respondents leave to file their motion for a new trial, because the same was tendered within the term, and within three months from the entry of judgment.

XIV.

That the pretended service of notice upon one Adrian W. Vollmer was void and of no effect, for the reason that said Adrian W. Vollmer was not an attorney of record for respondents, or either of them that he was not personally served with process or

notice, and did not reside at Lakeside, Washington, and was not a resident of the State of Washington, and had not even visited therein, for a period of 23 months prior thereto.

SPECIFICATIONS OF ASSIGNED ERRORS INTENDED TO BE URGED.

Assignments IV. and VI. relate to:

(a) Irregularity of the county commissioners' proceedings.

(b) That the record of the county commissioners' proceedings was not authenticated according to law and was improperly admitted in evidence.

(c) That the court was without jurisdiction by reason of the variance in the survey descriptions of the right-of-way described in the petitions and published notices with the survey description of the right-of-way of the established road and maps of the county engineer.

(d) The propriety of the entry of decrees appropriating the land to petitioners before the awards had been paid into court for the owners.

(e) Failure to segregate respondents' respective interests and award separate damages.

Assignments II. and XIV. relate to shortness of notice of hearings and trials, and pretended service of notice upon one not attorney for

respondents.

Assignment XI. relates to the point that the land condemned was not necessary for the public use.

Assignment IV. and VII. relate to the taking of the fee where an easement was sufficient for the purpose.

Assignment I. relates to the point that due process of law was not afforded appellants under the published notices, as provided by the statutes of the State of Washington.

Assignments III. V. VII. IX. and X. all relate to the point that the Act of Legislature, and the statutes of the State of Washington under which the condemnation of the land was sought are in conflict with ART III. sec. 2, ART. IV. sec. 2, Amendment ART. V. and Amendment ART. XIV. of the Constitution of the Constitution of the United States, and in conflict with Sections 2, 3, 16 and 32 of Art. I. and Section 19 of ART. II. of the Constitution of the State of Washington and does not constitute due process of law.

Assignment XII. relates to want of jurisdiction over respondent Wick, no personal service being had and no property owned by her described.

Assignment XIII. relates to abuse of discretion of the court in refusing to entertain motions for new trials.

ARGUMENT

INSUFFICIENCY OF THE COMMISSIONERS PROCEEDINGS

1. We contend that the record of the proceedings of the County Commissioners of Chelan County, upon which these condemnation proceedings are based, was improperly admitted as evidence of the legal establishment of the highway, that the same is fatally defective, and that it does not and cannot support the findings and judgments entered herein.

Sec. 3902, 2 Rem. & Bal. Code, (2 Rem. Comp. Stat. Sec. 4069) Pierce's Code Sec. 1663 provides:

> "The county commissioners of each county shall have and use a seal for the purpose of sealing their proceedings, and *copies of the same when signed and sealed by the said county commissioners, and attested by their clerk, shall be admitted as evidence of such proceeding in the trial of any cause in any court in this State;* and until such seal shall be provided, the private seal of the chairman of such board of county commissioners shall be adopted as a seal."

In the cases now before the Court, the petitioner's

"EXHIBIT NO. 1" being a certified copy of all proceedings before the board of county commissioners, bears the following certification: (R. 92-93)

"State of Washington,

County of Chelan, ss.

I, the undersigned Clerk of the Board of County Commissioners of Chelan County, State of Washington, do hereby certify that the foregoing is a true and correct copy of all proceedings before the Board of County Commissioners of Chelan County, Washington, in the matter of the establishment of South Shore Extension Road as of record in this office.

Witness my hand and official seal, this 4th day of June, 1930.

A. V. Shephard,

Deputy Auditor and Clerk of the Board of County Commissioners.

(Auditor's)
(Seal)

The late Judge Rudkin, in his memorandum opinion in the case of Chelan County v. Vollmer, et al, No. 1431 in the District Court of the United States, Eastern District of Washington, Northern Division, said in part:

". . . . The proceeding, of course, is statutory and it was incumbent on the petitioner to show that the highway, or county road, was legally established by its board of county commissioners before this proceeding was instituted. To prove

the legal establishment of the highway the petitioner offered in evidence a copy of the proceedings had before the board of county commissioners, which was certified to by the county auditor only."

"The proceedings before the board of county commissioners were not authenticated and certified in the mode prescribed by law, and the record of their proceedings was improperly admitted in evidence. The new trial must therefore be granted."

2. We contend that the Report of the County Engineer was utterly void. This report itself disclosed that he bases it upon his field notes of a survey which he began on April 27, 1928 and completed on July 3, 1928. (R. 78) The survey therefore was made many months prior to October 30, 1928, the date upon which he was directed by the county commissioners to make the same. The engineer filed his report, field notes and map, all on the same day upon which he was directed to so do, namely, October 30, 1928. A survey of the route was necessary and it would have been a physical impossibility to have made such survey, prepared the map and report to the Board, all within the same day. Obviously, the county engineer acted without authority in making the survey upon which his report and map are based, and obviously too he failed to ever make any survey or map thereof as he was so directed by the Commissioners' Resolution. Compliance with the law by the county engineer is jurisdictional. Sec. 2, Chap. 173,

Laws of 1925, provides:

> "*Whenever directed,* the county engineer shall make an examination of such proposed road and if necessary a survey thereof." and he "shall report thereon in writing to such board,..... He shall file with such report a correctly prepared map of such road as surveyed, which map must show the tracts of land over which said road passes, with the names, if known, of the several owners thereof, and shall file therewith his field notes and profiles of *such survey.*"

3. We challenge the sufficiency of the description of the published notice of hearing on the report of the county engineer. This notice makes no mention of the several tracts over which the proposed road will be established. The description in this notice which is set forth in full in the appendix, is in part as follows:

> "Commencing at survey sta. 420 plus 96.5 of So. Lake Shore Road, as of record being an interior point in Lot 3 of Sec. 3, Twp. 27 N., Rg. 21 E., W. M." running thence by courses and distances "and ending at survey sta. 488 plus 00.9 (an intersection with Twenty-five Mile Creek Road) being an interior point in SW¼ of NE¼ of Sec. 4, Twp. 27 N. Rg. 21 E:, W. M. the whole distance being about 1.3 miles, said road to be known as the So. Lake Shore Extension Road, all in Chelan County, Washington."
>
> "At said hearing any interested persons may appear and be heard for or against the establishment of the proposed change, in the South Lake Shore Road."

Without the aid of a surveyor, it would have been impossible for appellant Rosborough to know what property of hers it was proposed to take, and wholly impossible for appellants Tettemer and Wick to know whether or not any of their property would be affected. The notice is therefore void for uncertainty.

Fenton v. Minnesota Title Ins. etc Co., 15 N. D. 372, 125 Am. St. Rep. 599, 109 N. W. 366.

> "A published summons in a suit to quiet title which neither describes the land in controversy nor names the adverse claimants does not constitute due process against them, and a judgment taken against them is void, and subject to collateral attack."

Under Sec. 5, chap. 173. L. 1925, it was also necessary that the notice of hearing be posted at the termini of the proposed road. Nothing in the affidavit of posting shows upon what land notices were posted. (R. 85) There is no reference to the section, township, range, county or state, wherein the land was located. The affidavit shows that notices were as follows:

One notice on 4" pine tree 10 ft. to right of Sta. 422 plus 25.

One notice on 5" pine tree 5 ft. to left of Sta. 449 plus 10.

One notice on 4" pine tree 5 ft. to left of Sta. 487 plus 55.

4. Nowhere in the engineer's report or in the Commissioners proceedings does it appear that stone monuments were placed at the termini of the road as established, in accordance with Sec. 4, Chap. 173, L. 1925. (2 Rem. Comp. Stat. Sec: 6447-4)

Nowhere in the Commissioners' proceedings or in the engineer's report, does it appear that after passing the Resolution of intention to lay out and establish the road, the county made any effort to agree with the owners for the purchase of the right of way before bringing the condemnations, thus giving appellants no opportunity to either consider or negotiate a settlement of their damages.

Remington's Comp. Stat. Sec. 6780, provides that

> "Whenever the Board of County Commissioners shall find it necessary, for the purpose of straightening any permanent highway, lessening the gradients thereof, or otherwise improving the same to acquire or appropriate lands, real estate or other property, and are unable to agree with the owners thereof, upon the reasonable and fair value of such lands, real estate or other property, such board is hereby authorized to acquire the same by condemnation proceedings in the manner provided by law for the appropriation of lands, real estate or other property by private corporations authorized to exercise the right of eminent domain."

The burden is on petitioner that it endeavored but was unable to agree with the owner.

Oregon R. etc. Co. v. Oregon Real Estate Co., 10 Or. 444.

5. Furthermore, the county commissioners, neither in the Order of Establishment, nor elsewhere, directed the prosecuting attorney to proceed under the power of eminent domain, as alleged in the Petitions in condemnation, and as provided by Sec. 5, Chap. 173, L. 1925. (2 Rem. Comp. Stat. Sec. 6447-5)

INSUFFICIENCY OF THE NOTICES OF TRIALS

We further object to the shortness of notices given appellants in each of these cases. The notices for hearing for Order of Necessity the record shows (1st case—R. 52) (1d case—R. 56) were sent by the Clerk of the court by ordinary mail to the appellants addressed to Philadelphia, Pa., on May 26, 1930, stating that the hearing would be held on June 5, 1930 at 10:30 A. M. The Court will take judicial notice that the nine days allowed would all be consumed for the letter to reach Philadelphia and the recipient to reach Spokane, allowing no time for either consultation or preparation of a defense.

The same notice by ordinary mail was given appellants at the time of trial on damages, excepting that about twice the length of time was given.

In Illinois v. Pease, 207 U. S. 100, 52 L. Ed. 121, the Court said:

> "We know, because everyone knows, without the testimony of witnesses, that Kenosha, the place of the alleged crime, is only a short distance, within not more than one hour and a half travel by rail from Chicago."

and in U. S. v. Thornton, 160 U. S. 654, 40 L. Ed. 570,

> "In this case we are able to take judicial notice of the fact that claimant could not possibly have traveled from Mare Island to Washington and back within the four days which elapsed between his discharge and his re-enlistment."

46 C. J. 556, Sec. 62 and cases cited.

Attention is here called to the fact that notices were also mailed to one Adrian W. Vollmer, and that such notices designated him as "attorney for said parties (Lakeside, Washington)". The record shows that said Adrian W. Vollmer never was attorney for appellants, and by his affidavits (1st case R. 53-54) (2d case—R. 58) that he was not then nor had ever been or pretended to be counsel for appellants or any of them, or had ever appeared in these causes, and that he did not reside at Lakeside, Washington, and had not visited in the State of Washington for over 23 months. As a basis for its contention that said Vollmer was attorney for these appellants the peti-

tioner offered in evidence a letter written by him to the county commissioners on July 6, 1928, (Exhibit No. 8) many months prior to the Commissioners' resolution to lay out such a road. The letter reads as follows:

> First Creek Ranch, Lakeside, P. O.
> Chelan County, Washington,
> July 6th, 1928.
>
> Commissioners of Chelan County,
> Court House,
> Wenatchee, Washington.
> Gentlemen:
>
> Please note that the mail address of Miss Alice Barbee Wick and of Miss Margaret Rosborough is now:
>
> c/o Mr. Joseph B. Thomas, Suite 27, Transportation Bldg., 26 South 15th Street, Philadelphia, Pa.
>
> My temporary address is P. O. Box 1604, Spokane, Washington. Kindly send me copies of any notices or communications that you may send to either of above parties and kindly send them copies of any notices or communications sent to me.
>
> Thanking you in advance, I am
>
> Very truly yours,
> (signed) Adrian W. Vollmer

We submit that the above letter does not even hint that Mr. Vollmer was representing or intending to

represent appellants as counsel. The county admits that said Vollmer was not attorney for appellants by the fact that no notices of any nature were ever sent to him until after the death of J. D. Campbell, who was counsel for the appellants.

INSUFFICIENCY OF PROOF OF OWNERSHIP

1. We further challenge the sufficiency of the evidence offered to prove the alleged ownership of the lands condemned. The only evidence submitted on this point was the sworn testimony of Sam M. Driver, attorney for the appellee. (Transcript of Proceedings June 5, 1930, pp. 11-12) He testified as follows:

> "I am deputy prosecuting attorney of Chelan County, Washington, I have examined the certified abstracts of the property involved in these two condemnation proceedings, and also have checked them up in the records of the Auditor of Chelan County, Washington, and I found from my examination that the only persons having any interest in this land are, in the one case Margaret Rosborough (case No. 4501) and Alice Barbee Wicks. And in the other case, No. 4502, the only persons having any interest in the land involved in this case are Alice Barbee Wicks and Theodore S. Tettemer, and presumably his wife, Jane Doe Tettemer."

He makes no statement of what the interest of each is, whether as owner, joint owner, or encumbrancer. His statement of ownership does not coincide with the ownership of the tracts as

> shown by the Engineer's report. (R. 91). The deeds and the County Auditor's records are the best evidence of ownership.

2. Sec. 921 of Remington's Comp. Statutes provides that a jury ascertain and determine the compensation to be made in money to the owner or owners *respectively*, and the petitions in these cases so pray. No evidence was offered showing the respective interests of respondents nor did the jury apportion the damages.

TAKING THE FEE WHERE EASEMENT SUFFICIENT

The petitions in condemnation pray that a "judgment or decree be entered when said compensation shall have been determined to the effect that upon payment thereof. . . . *full title* to said property shall be at once vested in the petitioner" and the judgments provide that "upon payment by said Chelan County. . . . that the property. . . . *and the title thereto, free and clear of any and all encumbrances of any nature whatsoever*, shall pass to and become vested in Chelan County." The condemnor had no power to take the fee where an easement would satisfy the public needs.

> ". . . . where the statute does not prescribe the nature of the estate to be taken, only such estate may be taken by the condemnor as is sufficient to satisfy the purposes of the taking. The con-

demnation statutes are in derogation of the common law, and must be strictly construed. 68 A. L. R. p. 837.

Nichols on Eminent Domain, Sec. 150.

"....If an easement will satisfy the public needs, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require...."

Seattle v. Faussett, 123 Wash. 613, 212 Pac. 1085.

Warm Springs Irr. Dist. v. Pacific Live Stock Co., 270 Fed. 560.

ENTRY OF DECREES BEFORE PAYMENT OF MONEY AWARD

We further submit that the Decrees of Appropriation entered in these causes should be set aside, for the reason that they were entered without notice to appellants, and before just compensation including interest and costs had been paid into court for them, as provided by Sec. 927, Remington's Compiled Statutes.

The decrees of appropriation were entered on Dec. 15, 1930, and although warrants had been deposited with the Clerk, by the petitioner the money to pay the judgments was not received by the Clerk until December 26, 1930. Payment by warrants did not constitute a payment of the award as prescribed by the statute.

ART. 1, Sec. 16, of the Constitution of the State of Washington provides that no private property shall be taken or damaged for public or private use without just compensation having first been made.

In State ex rel O. W. W. S. Co. v. Hoquiam, 155 Wash. 678, the court said:

> "The statute provides not that the award shall be paid to the Clerk of the Court by check, but shall be paid into court. The fair inference from the statute is that it contemplates payment in money and not by check. There appears to be no escape from the holding that the award was not paid into court in the manner prescribed by statute and upon notice to the opposite party and therefore the attempted payment by check to the clerk was ineffectual to suit the requirement of the statute.....The decree of possession and appropriation entered....will be set aside...."

In Peterson v. Smith, 6 Wash. 163, 32 Pac. 1050, the court said:

> "....Under the constitutional guaranty, the owner of the land appropriated in this case by the county could not be compelled to present a claim for damages. He can remain quiet and be assured that before his property is condemned the county must ascertain his damage and either pay it to him or pay it into court for his benefit...."

And in State ex rel Smith v. Superior Court, 26 Wash. 278, 66 Pac. 385, where it was sought to sub-

stitute a bond for the actual payment of money, the court said:

> "A constitutional right is involved here. Sec. 16 of Art. 1 of the State constitution provides that 'no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner'. . . . viewed in any aspect of the case, whether taken by the sovereign or by the corporation under sovereign authority, it is a destruction of the constitutional guaranty for the protection of private property to appropriate it, without the consent of the owner, to a public use without first making compensation to him in money for the value of the property of which he has been deprived;"

ERRONEOUS DESCRIPTION OF THE PROPERTY

The Court had no jurisdiction to render the judgment and decrees of appropriation here appealed from for the reason that in each of these cases a fatal error was made in the description in the published notices. The trial court therefore obtained no jurisdiction over non-resident owners.

Laws for the condemnation of property for public use are to be strictly construed. Remington's Comp. Stat. Sec. 921 provides that there shall be "a petition in which the land, real estate, premises or other property sought to be appropriated shall be described with *reasonable certainty*."

In State ex rel Patterson, et ux. v. Superior Court for King County, 102 Wash. 331, 173 Pac. 186, the court held:

> "We are of the opinion that the *petitioner should be required to describe the land sought to be appropriated with all the certainty that is possible* in order to determine the land appropriated as condemned by actual survey. It is necessary also, in order that a jury of condemnation may know how much land is appropriated and to be paid for."

Nichols on Eminent Domain, Sec. 399:

> "This description should be, it is sometimes said, as accurate as is required in the case of a deed of land. At any rate it must be such that a surveyor could locate the parcel described without the aid of extrinsic evidence."

2 Lewis, Eminent Domain, 2d Ed. Sec. 307 and cases cited;

State ex rel Oregon, etc., v. Superior Court, 45 Wash. 321, 88 Pac. 334;

State ex rel Patterson v. Superior Court, *supra;*

People ex rel Eckerson v. Haverstraw, 137 N. Y. 88, 32 N. E. 1111;

Lexington Print Works v. Canton, 167 Mass. 341, 45 N. E. 746.

"Failure of the petition, complaint, or application

to thus describe the property, *or any uncertainty in this respect*, will vitiate the proceedings," 20 C. J. 954.

> In Glover v. Boston, 14 Gray (Mass.) 282, the court said
>
> "The appropriation of private property to the public use, which is one of the highest acts of sovereign power, should not be accomplished by the use of ambiguous or uncertain language. The presumption is in favor of the owner of the land, and every act done by public authority which interferes with his rights should be, as it always may be, clear and intelligible."
>
> Quoted with approval in Lexington P. Works v. Canton, *Supra.*

Remington's Comp. Stat. Sec. 922, provides that the Notice served upon the owner or published shall state briefly the objects of the petition and shall contain "a description of the land, real estate, premises, or property sought to be appropriated."

In Stafford vs. Multnomah County, etc. 108 Ore. 197, 204 Pac. 158, the court said:

> "It is a fundamental principle that when the land of an individual is sought to be condemned for public purposes a definite description of the property shall be given."
>
> * * * *
>
> "*It was the duty* of the defendant drainage district, if it would acquire a right of way over

> real property by eminent domain, so to describe the land it would take as to enable the landowner to know what part and how much of his land was about to be taken from him."
>
> * * * *
>
> "In the establishment of a public road, the owner of the land is advised as to the course of the highway, its width, the point of entrance upon his land and exit therefrom. He is thus enabled to know how much of his property has been taken for the purpose of a public highway, where situate, and is enabled to estimate his damage, if any.....In an action by the state, or by any of its agencies, designed for condemning real property, *the petition or complaint demanding condemnation must contain an accurate description of the property to be acquired.*"

The Court said in Daily v. Missouri Pac. Ry. Co., 170 N. W. 888, 103 Neb. 219,

> " a petition containing inaccurate statements that are material respecting the dimensions of the land affected will render condemnation proceedings void that are held thereunder."

and to the same effect is Union Terminal Ry. Co. v. Kansas, 60 Pac. 541.

In the Matter of the Application of the N. Y. C. & H. R. R. Co. to acquire certain lands of Elizabeth Rau, 70 N. Y. 191, the court held:

> "In proceedings of this character (condemnation) extreme accuracy is essential, for the pro-

tection of the rights of all the parties."

But in these condemnation cases, the land to be taken is not described with *reasonable certainty;* in the first case other land is described and in the second case the description contradicts itself and is so indefinite that the land cannot be located.

The land to be condemned must be the same land over which the road has been previously established by Order of the Board of County Commissioners.

> "After the establishing of *such highway,* the prosecuting attorney, when directed by the board of county commissioners, shall proceed under the power of eminent domain *to acquire such lands* and other property and property rights *as may be necessary for such highway* purposes in the manner provided by law for the taking of private property for public use." Chap. 173, L '25, sec. 5.

In these cases the petitioner does not describe the same land over which the road was established. In the Rosborough case the petition and published notice describe land which is not possible for any road, but the apparent assumption of the petitioner is that the land under the established road is the land condemned.

It is true that the error in the description as they appear in these condemnation proceedings are not apparent without analysis and deduction. But the Court will make the necessary calculation from the

evidence, and records in the cases.

City of Chicago v. Williams, 254 Ill. 360, 98 N. E. 666;

1 Elliott on Evidence, Sec. 36.

The Court will take judicial notice of the rules of mathematics and land surveying.

Stanton v. Hotchkiss, 157 Cal. 652, 108 Pac. 864;

Stephens v. Stephens, 108 Ark. 53, 156 S. W. 837:

1 Elliott on Evidence, Sec. 39.

The road as established by the final Order of the County Commissioners is based upon the report and map of the County Engineer. The initial point is the easterly terminus and the courses and distances are continuous to the west terminus. (R. 83-84) (Exhibits Nos. 4 and 5)

For convenience, the diagrams "A" and 'B" in the Appendix, compare the road as described in the proceedings before the County Commissioners, and the road rights of way as described in the Petition, published Notice and other proceedings in the condemnation suits. From these the errors will at once be seen.

These descriptions are also set out in the appendix.

In the condemnation proceedings, in the Rosbor-

ough case the courses and distances of the description as set forth in the petition and published notice coincide with the road as established by the County Commissioners from the western terminus eastward to a point near the northwest corner of Lot 2 in Sec. 3, (being Sta. 449 plus 90.1) of survey as shown on the engineer's map, "Exhibit No. 4." At that point, however, where the course in the county commissioners' proceedings recites "thence on a 16° 00′ curve to the right thru an angle of 47° 01′, 293.9 ft." in the petition and published notice and other records in the condemnation proceedings, a curve of *six* degrees has been substituted for one of *sixteen* degrees. The consequence of this substitution is to change the direction of the center line and throw the road and land to be taken for the right of way, north and east of the true course, so that if followed it would lead into Lake Chelan. The ultimate result is that the road will be built on land of appellants not condemned. Diagram "A" in the Appendix clearly shows this situation.

In the Wick-Tettemer case, the second described parcel of land to be taken was erroneously described, namely, a small triangular parcel. The description is so contradictory that the land cannot be located.

The known point from which the survey starts is the section corner common to Sections 3, 4, 9 and 10, in T. 27 N. R. 21 E. W. M., thence by various courses and distances which lead north and east out

into Lake Chelan and back again, and arrives at the initial point in the interior of Lot 2, Sec. 3, approximately 775 ft. east and 307 ft. south of the northeast corner of the SW¼ SW¼ of Sec. 3, and a considerable distance south of the route of the proposed road as established, by the county commissioners. Diagram "B" set out in the appendix shows this situation.

The description leading to the initial point is wrong in most of its statements. The system of error seems to have been to add to the straight length of the road the total length of the curve at each end. If half the curve length were used it would be nearer right, but even then would not be correct, for the distance around the curve is shorter than lines carried out straight to the intersection as used in the description.

Nowhere, except at the beginning and at the end does the description in this case, or in the Rosborough case, attempt to tie to any known point, although it is customary and the practice of surveyors to make reference to such points in order to verify the location.

In the Wick-Tettemer case, the initial point is described as being the "northeast corner of said SW¼ of the SW¼ of Section 3, the initial point and place of beginning of this description." Then follows a

description of a small tract whch ends with a point "30 feet distant from the survey line of said South Lake Shore Extension Road."

It is true that a monument or known point mentioned will prevail over a point located by measurement. But, the northeast corner of the SW¼ SW¼ of Sec. 3, is not marked by any monument. Neither is it a known point except that it is capable of ascertainment by measurement. But, the measurements given in this very survey purport to be an attempt to establish that point, commencing at a point that is known and established, namely, the section corner between sections 3, 4, 9 and 10. Who can say from the record which is the place?

The reference to "a point 30 ft. distant from the survey line of said South Lake Shore Extension Road" does not clear the confusion, because it is indefinite and because it is not shown whether the already existing road or the new proposed road was meant. The name of the new proposed road was not as stated in this description, but was as declared by order of the county commissioners in their Resolution of intention and in their Order of Establishment, and is "Change in South Lake Shore Extension Road."

From the foregoing, it is apparent that the description of this small tract as described in the peti-

tion and published notice in condemnation was wrong entirely, and not located in the new proposed road at all, and it is not apparent which of two different and widely separated points was intended and that therefore the land was not described with "reasonable certainty."

If the land was not described with reasonable certainty in the petition and published notices in condemnation, the requirements of the law were not fulfilled and the Court had no jurisdiction of the land, and could not make decrees in rem.

In the case of Toledo A. A. & N. R. Co. v. Munson, 57 Mich. 42, 23 N. W. 455, the court held:

> "Jurisdictional defects may be noticed at any stage of the proceedings, for the reason that if the court proceeds without jurisdiction, the whole proceedings are null and void; and it would be of no avail to send the matter back for further proceedings before the court or another jury. It is therefore proper here to point out, that the petition filed as the foundation of these proceedings. . . . was insufficient to confer jurisdiction, because it did not comply with the requirements of the statute prescribing what such petition should contain. The law requires that each distinct parcel of land shall be described, and the owner thereof, if known, shall be named."

On the other hand, no personal service of process in these proceedings was made on any of the appell-

ants. Special appearances were made in both cases, both at the time the cases were removed to the Federal Court, and in all subsequent motions, demurrers and proceedings these special appearances were preserved. The cases both went to trial upon the hearing of necessity and for fixing damages without appearance of the parties or representation by counsel. The Court therefore had no jurisdiction of the persons of the appellants and could enter no decrees in personam.

It follows that both judgments and decrees of appropriation are void.

INSUFFICIENCY OF PUBLISHED NOTICE TO CONSTITUTE DUE PROCESS OF LAW

The Eminent Domain Statutes of the State of Washington, under which these proceedings were brought, being Act of Mar. 21, 1890, p. 925, sec. 2, (Rem. Comp, Stat. sec. 922) provides that "*a notice*, stating briefly the objects of the petition, and containing a description of the land, real estate, premises or other property sought to be appropriated, and stating the time and place when and where the same will be presented to the court or judge thereof, *shall be served on each and every person named therein* as owner, encumbrancer, tenant, or otherwise interested therein, *at least ten days previous to the time designated in such notice for the presentation of such petition.* Such service shall be made by delivering

a copy of such notice to each of the persons or parties named therein, if a resident of the state;* * * *In all cases where the owner, or person claiming any interest in such real or other property, is a non-resident of this state, * * * service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks;* * * and such publication shall be deemed service upon each of such non-resident persons, * * * "*

There are two distinct things provided by this Statute; the first is a notice to be served at least ten days previous to the time of hearing; the second is publication of that notice once a week for two successive weeks, which is deemed service upon a non-resident.

Notices were issued January 5, 1929, by the prosecuting attorney for Chelan County, directed to the appellants, and the time of presentation to the Court was fixed as January 30, 1929 at 9:30 A. M.

The appellants, all being non-residents, service was made by publication in a newspaper published in Wenatchee, Washington. The affidavit of publication shows that publication began Jan. 7, 1929 and ended Jan. 28, 1929. The dates of publication do not appear.

As we interpret this Statute, publication would

have been made for a full two weeks from January 7, 1929, the first day of publication, and ending on January 21, 1929. This would have amounted to *service of the notice upon non-resident owners.* Then should have followed the ten days fixed by the Statute as the *length of the notice* to all owners and other interested persons. The statute provides: "*and such publication shall be deemed service upon such non-resident person.*" Service of what? It is clear that it means service of the ten days' notice which all owners and interested persons are to receive, which service became effective in the case of a non-resident, only upon the expiration of the publication. Service was not made until the two full weeks' or fourteen days' publication was complete. No action could be had or hearing fixed before ten days after the last day of the two weeks' publication.

In the case of Early v. Homans, 16 How. 610, construing a statute requiring publication of notice in a newspaper, the court held:

> ". . . . twelve successive weeks is as definite a designation of time, according to our division of it, as can be made.
>
> "When we say that anything may be done in twelve weeks, or that it shall not be done for twelve weeks, as the happening of a fact which is to precede it, we mean that it may be done in twelve weeks, or eighty-four days, or, as the

case may be, that it shall not be done before." Approved in:

Leach v. Burr, 188 U. S. 510;
Market Natl. Bank v. Pacific Natl. Bank, 89 N. Y. 397;

Cox v. Northern Wisconsin Lumber Co. 82 Wisc. 141;

Foster v. Vehmeyer, 133 Calif. 459;
Auerbach v. Maynard, 26 Minn. 421;
Bond v. Penna. R. R. Co. 124 Minn. 195;
State v. Morrison 132 Minn. 454.

In the case of Appeal of Fred W. Meyer, 158 Minn. 433, it was said:

> "Where a statute requires notice of process to be served by publication for a stated number of weeks in the official newspaper, the service becomes complete a week after the last publication."

Assuming that publication was complete on January 21, 1929 this leaves only eight days' notice, excluding the date of hearing, or, nine days' notice including the date of hearing which was fixed for January 30, 1929 at 9:30 A. M., these cases should not have been heard before January 31, 1929, which was one day after the date actually fixed in the notices for hearing thereof, and therefore the whole proceedings were void as not complying with the statute and for that reason depriving these appellants of their property without due process of law, con-

trary to Amendment ART. XIV. Sec. 1, of the Constitution of the United States, and contrary to Sec. 3, of ART. 1, of the Constitution of the State of Washington.

Any other interpretation of this Statute would authorize a publication once a week for two successive weeks, which might be satisfied by a publication on two days seven days apart, and a hearing not earlier than ten days from the first publication. This would clearly be unreasonable notice to a non-resident, and particularly to one residing across the United States, as do these appellants, and a violation of due process of law and the equal protection of the laws guaranteed to them under Amendment ART. XIV. Sec. 1, of the Constitution of the United States, and Sec. 3 of ART. 1. of the Constitution of the State of Washington, and a violation of the rights, privileges and immunities guaranteed to them under ART. IV. Sec. 2, and ART. III: Sec. 2, of the Constitution of the United States.

Whether, under such an interpretation of this Statute due process would be assured non-residents, is in part dependent upon the facts of each case. The facts of the cases at bar are such as to have required a considerable time by way of notice for these appellants to have appeared and prepared for a defense of the cases. The appellants resided in Philadelphia, entirely across the continent from where the land

was located; it was a journey of five days between their homes and Wenatchee, where the Court sat. They were citizens of Pennsylvania, and were entitled to have their cases transferred to a Federal Court. Some preparation was needed for a trip of this character. Consultation with counsel and experts was reasonably necessary before undertaking the defense of such proceedings. Removal to the Federal Court required the preparation of a petition, giving bond, and giving notice to Chelan County of the application for removal. In Washington, the titled to at least three days' notice of any hearing, motion or application, and if served outside the rule is that parties appearing in an action are encounty then at least ten days' notice by mail is to be given.

Had the first issue of the paper containing the published notice been mailed at once to appellants, they would not have received same in the ordinary course of mail until the sixth day following. Had they immediately journeyed to Wenatchee by the usual means of travel, they would not have reached there until the eleventh or twelfth day. By the requirement of more than one publication in the newspaper the Legislature surely had in mind the possibility that the first publication might escape the attention of the land owner.

The provision in the statute that such notice may

be published in any newspaper published in the county imposes further hardship upon non-resident owners, the county of Chelan being as large as some of the smaller states.

Resident owners who are personally served with notice receive better protection than do non-residents served only by publication.

The statute makes no provision for the mailing of a copy of the notice to non-residents. Evidently the petitioner was doubtful of the sufficiency of the statute to give adequate or reasonable notice to non-residents because not only was the notice published more times than the statute required but copies of the notice were mailed to appellants. However, this cannot and does not take the place of due process of law.

> "This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace."
>
> Central of Ga. Ry. Co. vs. R. R. Commission, 215 Fed. 427.

> "The law itself must save the parties' rights and not leave them to the courts as such."
>
> Louisville & Nashville R. R. Co. v. Stockyards Co. 212 U. S. 132.

> "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

Roller v. Holly, 176 U. S. 398, 44 L. Ed. 520. "Nor can extra-judicial or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires."

Coe v. Armour Fertilizer Works, 237 U. S. 413.

"Nor is the constitutional validity of a law to be tested by what has been done under it but rather by what may be done under it."

Chicago, Milwaukee & St. Paul Ry. Co. v. Board of Railroad Commissioners, 247 Pac. 162;

State ex rel. Redman v. Meyers, 210 Pac. 1064;

State ex rel. Holliday v. O'Leary, 115 Pac. 204.

"To admit that a method of service, whether it amounts to due process of law or not, is sufficient because it is prescribed by state statute, is to admit that a state may impair rights guaranteed by the National Constitution. The prohibitions of the constitution cannot be thus evaded."

Fayerweather v. Ritch, 195 U. S. 276, 25 Sup. Ct. 58, 49 L. Ed. 193; 5 Ency. U. S. Sup. Ct. Rep. 627.

The protection of the Federal Constitution applies whatever the form in which the legislative power of the state is exerted, whether by a con-

stitution, an act of legislature, or any act of any subordinate instrumentality.

Standard Scale Co. v. Farrell, 249 U. S. 571.

In Chicago R. Co. vs. Chicago; 166 U. S. 226, the court said:

> "But a state may not, by any of its agencies disregard the prohibitions of the 14th Amendment.
>
> .....This court, in referring to the 14th Amendment, had said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application, where the invasion of private rights is effected under the forms of state legislation!' "

In Roller v. Holly, 176 U. S. 398, 44 L. Ed. 520, a Texas statute was held unconstitutional and not affording due process of law, where personal service was made on non-resident defendant in Virginia on December 30, 1890 to appear in Texas on January 5, 1891 The court said:

> "....it would have required four days of constant travel to reach Groesbeck, giving the plaintiff but one day, and that a Sunday, to make preparations to comply with the exigencies of the notice. This estimate, too, makes no allowance for accidental delays in transit.
>
> " That a man is entitled to some notice before he can be deprived of his liberty or property is

> an axiom of the law to which no citatian of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose."

And after reviewing the statutes of many states, the court proceeded to say:

> "It may be said in general with reference to these statutes that in cases of publication, notice is required to be given at least once a week for from four to eight weeks, and in case of personal service out of the state, no notice for less than twenty days between the service and the return day is contemplated in any of the states except Mississippi, where a personal notice of ten days seems to be sufficient."

We wish to call the attention of the Court to other provisions of the Eminent Domain statutes of the State of Washington, subsequently enacted. Act approved Mar. 13, 1907, p. 316 L. '07 (Rem. Comp. Stat. sec. 9219) (Sec. 7549 Pierce's Code) applicable to service of process on non-resident owners or defendants, provides for service by publication as in *other civil actions.* The time and manner of service by publication in civil actions is as follows:

> "The publication shall be made in a newspaper printed and published in the county where the action is brought. . . . *once a week for six consecutive weeks.* . . . .and the *service* of the sum-

> mons *shall be deemed complete at the expiration* of the time prescribed for publication as aforesaid. . . . . The summons shall contain the date of the first publication, and shall require the defendant or defendants upon whom service by publication is desired, to appear and answer the complaint within sixty days from the date of the first publication of such summons;. . . . ."
> (Rem. Comp. Stat. sec. 233) (sec 8446 Pierce's Code)

Sec. 57 of the Judicial Code, regulating procedure on the question of notice by publication, provides that where personal service on an absent defendant is not practical, the court may direct that the order shall be *published not less than once a week for six consecutive weeks.*

While we do not contend that these sections of the statute are controlling, or repeal the statute of eminent domain by private corporations, yet counties should be placed in no more favorable position than cities, and this should be taken into consideration by the court in determining whether due process has been given these appellants under their constitutional rights.

In the cases at bar, appellants *appeared specially* and objected to the jurisdiction of the court over them or their property, and questioned the constitutionality of the statutes by which they were pretended to have been brought into court. They participated neither in the consolidated trial on public

use and necessity nor in the separate trials on damages, in person or by counsel. Consequently, the appellee must strictly rely not only upon a full compliance with the statute as to service of notice but also upon the sufficiency of the statute itself to give adequate notice to non-resident owners. If the statute authorizing the service by publication does not afford due process of law, then no notice has been given appellants. We assert that the statute is either constitutional or unconstitutional. If unconstitutional, by reason of the fact that it does not provide a sufficient notice, it is wholly void as far as these appellants are concerned and can afford no ground for service by publication, and hence any proceedings thereunder are entirely irregular and do not constitute due process of law.

We urge the foregoing notwithstanding the decision of the court in State ex rel Woodruff v. Superior Court, 145 Wash. 129, 259 Pac. 379, and Wick v. Chelan Electric Co., 280 U. S. 108, because in neither of these cases did the court take into consideration that full ten days notice had not been given appellants after completion of the two weeks publication as required by the statute in question. Furthermore appellants in the cases at bar made special appearances and were neither present at nor participated in, either the hearing on necessity or the trial on damages. Therefore appellee must show not only that the statute has been strictly complied with, but

that the statute is adequate in itself to give due notice to appellants.

> McDonald v. Mabee 243 U. S. 90
> "Notice and an opportunity to be heard are essential requisites to the jurisdiction of all courts, even in proceedings in rem."
>
> Dorr v. Rohr. 82 Va. 359.

ERROR IN DENYING MOTIONS AND OVERRULING DEMURRERS

The District Court erred in denying the motions to quash and in overruling the demurrers to the Notices and Petitions and denying the motions to make more definite and certain or in the alternative for bills of particulars, for the reasons hereinbefore set forth.

The special appearances of appellants were maintained in the motions to quash and demurrers, and in all subsequent proceedings and exceptions duly made and allowed to the denial of these motions and orders.

It is held in the case of Cain v. Commercial Publishing Company, 232 U. S. 124, 58 L. Ed. 535, that a special appearance can be made and special appearance maintained for the purpose of raising the question of jurisdiction after the case has been removed from the state to the federal court.

ERROR IN REFUSING NEW TRIALS

The Court erred and abused its discretion in refusing to allow appellants to file their motions for new trials.

As disclosed by the affidavit accompanying the applications for leave to file motions for new trials, the same were presented within the term and within ninety days from the date of the entry of the judgments. Therefore, it was an abuse of discretion on the part of the court to deny such applications and refuse to consider the motions for new trials.

Mattox v. U. S. 146 U. S. 140,
56 L. Ed. 517;

Felton v. Spiro, 78 Fed. 576;

James v. Evans, 149 Fed. 136;

Pugh v. Bluff City Excursion Co. 177 Fed. 399;

Higgins v. U. S. 185 Fed. 710.

We respectfully submit that the Judgment and Decree of the District Court in each of these cases should be reversed and the proceedings dismissed.

BERKEY & COWAN
Chas F. Cowan
Attorneys for Appellants
Specially appearing.

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204-6 Wall Street Bank Bldg.,
Spokane, Washington.

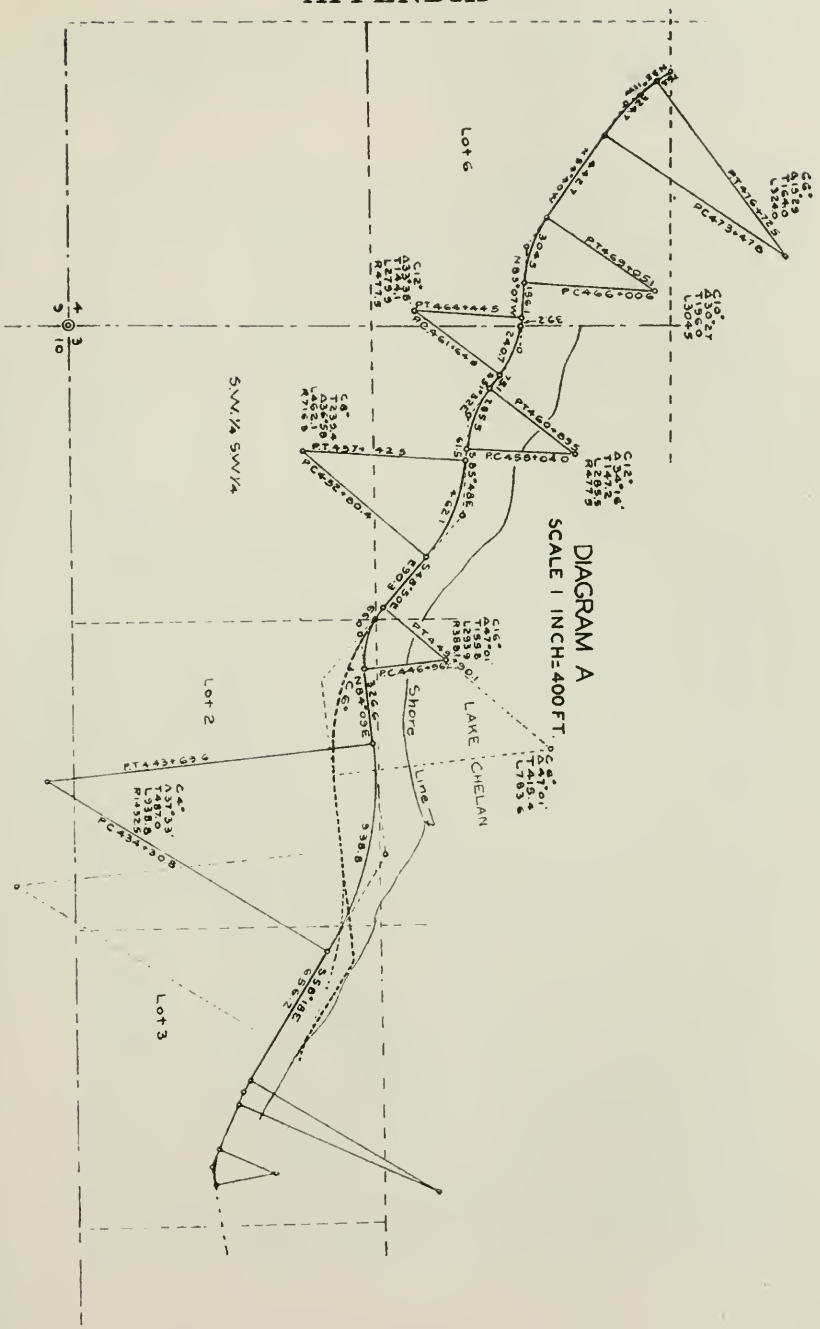

DIAGRAM A
SCALE 1 INCH = 400 FT.

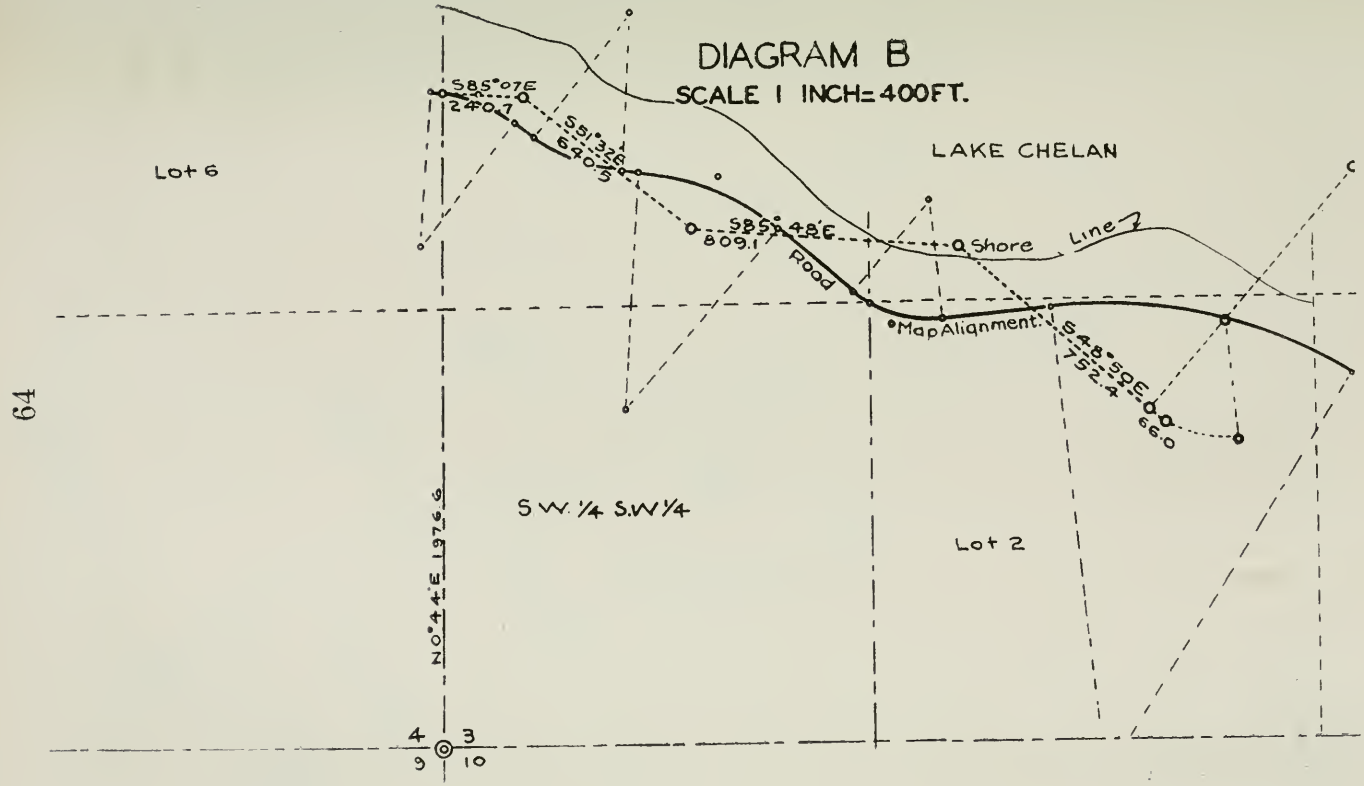
DIAGRAM B
SCALE 1 INCH=400FT.
LAKE CHELAN
Lot 6
S85°07E
2401
S51°32E
640.5
S85°48E
809.1
Road
Shore Line
Map Alignment
S48°55E
752.4
660
S.W. 1/4 S.W. 1/4
Lot 2
N0°44E 1976.6
4
3
9
10

64

Description of Road as contained in published notice of hearing upon the Report of the county engineer:

"Commencing at survey sta. 420 plus 96.5 of So. Lake Shore Road, as of record being an interior point in Lot 3 of Sec. 3, Twp. 27 N., Rg. 21 E., W. M. running thence from a course N. 63° 52′ W. on a 20° curve to left thru an angle of 35° 26′ 177.2 ft. thence S. 80° 42′ W. 3.5 ft. thence on a 21° curve to right thru an angle of 33° 41′, 160.4 ft; thence N. 65° 37′ W., 215.1 ft., thence on a 6° curve to right, thru an angle of 7° 19′, 121.9 ft.; thence N. 58° 18′ W. 656.2 ft.; thence on 4° curve to left thru an angle of 37° 33′, 938.8 ft.; thence S. 84° 09′ W., 326.6 ft.; *thence on a* 16° *curve* to the right thru an angle of 47° 01′, 293.9 ft.; thence N. 48° 50′ W., 290.3 ft.; thence on an 8° 00′ curve to left thru angle of 36° 58′, 462.1 ft., thence N. 85° 48′ W., 61.5 ft, thence on a 12° 00′ curve to right thru an angle of 34° 16′, 285.5 ft., thence N. 51° 32′ W., 75.1 ft.; thence on a 12° 00′ curve to left, thru an angle of 33° 35′, 279.9 ft.; thence N. 85° 07′ W., 156.1 ft.; thence on a 10° 00′ curve to right thru an angle of 30° 27′, 304.5 ft.; thence N. 54° 40′ W., 442.7 ft.; thence on a 6° 00′ curve to right thru an angle of 19° 29′, 324.7 ft.; thence N. 35° 11′ W., 106.6 ft.; thence on 2° 00′ curve to left thru an angle of 8° 09′, 407.5 ft.; thence N. 43° 20′ W., 231.9 ft.; thence on a 6° 00′ curve to right thru an angle of 15° 03′, 250.8 ft.; thence N. 28° 17′ W. 131.6 ft. and ending at survey sta. 488 plus 00.9 (an intersection with Twenty-five Mile Creek Road) being an interior point in SW¼ of NE¼ of Sec. 4, Twp. 27 N. Rg. 21 E., W. M. . . ."

(1st case—R. 83-84)
(2d case—R. 89-90)

Description of right-of-way as contained in Petition and notice in Chelan County v. Rosborough and Wick, (1st case) Appeal No. 6429.

"Tying to the section corner common to Sections 3, 4, 9, and 10, T. 27 N., R. 21 E.; W. M., and run thence N. 0° 44′ E., following the section line between said Section 3 and 4, a distance of 1976.6 feet; thence N. 85° 07′ W., 351.3 feet; thence N. 54° 40′ W., 762.7 feet; thence N. 35° 11′ W., 240.6 feet more or less to the north boundary line of said Lot 6 of Section 4, T. 27 N., R. 21 E., W. M., the initial point and place of beginning of this description. Thence a strip of land 30 feet wide on the right side and 30 feet wide on the left side of the following described line. From the initial point, as hereinabove described, run thence S. 35° 11′ E., 76.6 feet; thence on a 6° curve to the left, having a central angle of 19° 29′ a distance of 324.7 feet; thence S. 54° 40′ E., 442.7 feet; thence on a 10° curve to the left, having a central angle of 30° 27′, a distance of 304.5 feet; thence S. 85° 07′ E., 156.1 feet; thence on 12° curve to the right, having a central angle of 33° 35′, a distance of 279.9 feet; thence S. 51° 32′ E., 75.1 feet; thence on a 12° curve to the left, having a central angle of 34° 16′, a distance of 285.5 feet; thence S. 85° 48′ E., 61.5 feet; thence on a 8° curve to the right, having a central angle of 36° 58′, a distance of 462.1 feet; thence S. 48° 50′ E., 290.3 feet; *thence on a* 6° *curve* to the left, having a central angle of 47° 01′, a distance of 293.9 feet; thence N. 84° 09′ E., 326.6 feet; thence on a 4° curve to the right, having a central angle of 37° 33′, a distance of

938.8 feet; thence S. 58° 18′ E., 656.2 feet; thence on a 6° curve to the left, having a central angle of 7° 19′, a distance of 121.9 feet; thence S. 65° 37′ E., 215.1 feet; thence on a 21° curve to the left, having a central angle of 33° 41′, a distance of 160.4 feet; thence N. 80° 42′ E., 3.5 feet to an interior point in Lot 3, Section 3, T. 27 N., R. 21 E., W. M., the end of this description, which described parcel of land contains 7.53 acres more or less according to survey thereof, not including however, that part of said right of way contained within the SW¼ of the SW¼ of said Section 3."

(1st case—R. 1-5)

Description of the second described portion of the right-of-way, as contained in Petition and Notice in Chelan County vs. Wick and Tettemer (2d case) Appeal No. 6430:

"Tying to the section corner common to Sections 3, 4, 9 and 10, T. 27 N. R. 21 E. W. M., and run thence N. 0 degrees 44′ E., following the section line between said Sections 3 and 4 a distance of 1976.6 feet; thence S. 85 degrees 07′ E. 240.7 feet; thence S. 51 degrees 32′ E., 640.5 feet; thence S. 85 degrees 48′ E., 809.1 feet; thence S. 48 degrees 50′ E., 752.4 feet; thence on a 6 degree curve to the left, having a radius of 955 feet, a distance of 66 feet more or less to the northeast corner of said SW¼ of the SW¼ of Section 3, the initial point and place of beginning of this description. Thence an irregular shaped piece of land bounded by a line running south from the initial point as hereinabove described, following the east boundary line of said SW¼ of the SW¼ of Section 3, to a point

30 feet distant from the survey line of said South Lake Shore Extension Road; thence in a northwesterly direction on a curve having a radius of 985 feet, being parallel and 30 feet distant from survey alignment curve at this place, to the north boundary line of said SW¼ of the SW¼ of Section 3; thence east following the north boundary line of said SW¼ of the SW¼ of Section 3, to the initial point and place of beginning, which described parcel of land contains 0.02 acre more or less."

(2d case—R. 4)

CHAPTER 173

Session Laws of Washington, 1925.

PROCEDURE TO ESTABLISH COUNTY ROADS

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. (Sec. 5992, Sub. 2, Pierce's Code) County roads shall be laid out and established as provided in this act. The board of county commissioners by unanimous vote of such board may by resolution entered upon their minutes declare their intention to lay out and establish or widen any county road and that the same is considered a public necessity and shall direct the county engineer to report upon such project.

Section 3. (Sec. 5992, Sub. 4, Pierce's Code)

Whenever directed, the county engineer shall make an examination of such proposed road and if necessary a survey thereof. After examination, if he deems the same to be impracticable, he shall so report to the board of county commissioners without making any survey, or he may examine or examine and survey any practicable route which would serve such purpose. Whenever he shall consider any such road or modified route practicable he shall report thereon in writing to such board, giving his opinion (1) as to the necessity of the road; (2) as to the proper terminal points, general course and length thereof; (3) as to the proper width of the road, which shall be not less than thirty feet nor more than one hundred twenty feet, exclusive of slopes for cuts and fills: (4) as to the probable cost of construction of the road including all necessary bridges, culverts, clearing, grubbing, drainage and grading; (5) and such other facts, matters and things as he may deem of importance to be considered by such board. He shall file with such report a correctly prepared map of said road as surveyed, which must show the tracts of land over which said road passes, with the names, if known, of the several owners thereof, and shall file therewith his field notes and profiles of survey.

Section 4. (Sec. 5992 Sub. 5, Pierce's Code) The board of County commissioners shall fix a time and place for hearing upon such report and cause notice thereof to be published once a week for three suc-

cessive weeks in the county official newspaper and to be posted for at least twenty days at each of the termini of such road as recommended by the county engineer. Such notice shall set forth the termini and width of such road as recommended in such report and state that all persons interested may appear and be heard at such hearing upon such report and upon the matter of the establishment of such road. On the day fixed for such hearing, or adjourned hearing, the said board, upon due proof to the satisfaction of the board, made by affidavit, of due publication and posting of such notice of hearing, shall consider said report and all evidence relative to such establishment and, if said board finds that such proposed road is a public necessity, they may establish the same by resolution or other order. The cost and expense of such establishment and of the right of way thereof shall be paid from the general road and bridge fund, unless the board of county commissioners shall, in the order of establishment, direct that the same be paid from the fund of the particular road district or districts in which such road may be located. The county engineer shall cause stone monuments to be placed at the termini of all such roads.

Section 5. (Sec. 5992 Sub. 6, Pierce Code) After the establishment of such highway, the prosecuting attorney, when directed by the board of county commissioners shall proceed under the power of eminent domain to acquire such lands and other property and

property rights as may be necessary for such highway purposes in the manner provided by law for the taking of private property for public use.

REMINGTON'S COMPILED STATUTES of WASHINGTON, 1922.

Sec. 921 *Eminent Domain by Corporations-Petition, Requisites of.*

Any corporation authorized by law to appropriate land, real estate, premises, or other property for right of way or any other corporate purposes, may present to the superior court of the county in which any land, real estate, or premises, or other property sought to be appropriated shall be situated, or to the judge of such superior court in any county where he has jurisdiction or is holding court, *a petition in which the land, real estate, premises, or other property sought to be appropriated shall be described with reasonable certainty, and setting forth the name of each and every owner, encumbrancer, or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records,* the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by such corporation, *to such owner or owners, respectively,* and to all tenants, encumbrancers, and others interested, for the taking or injuriously affecting such lands, real estate, premises, or other property, or in case a jury be waived, as in other civil cases in courts of record in the manner prescribed by law, then that the compensation to be

made, as aforesaid, be ascertained and determined by the court, or judge thereof, (Cf. L. '88 p. 58, sec. 1; L. '90, p. 294, sec. 1; 2 H. C., sec. 648).

Sec. 922. *Notice, Contents of and Service.* — A notice, stating briefly the objects of the petition, *and containing a description of the land, real estate, premises or property sought to be appropriated.* and stating the time and place when and where the same will be presented to the court, or the judge thereof, *shall be served on each and every person named therein as owner,* encumbrancer, tenant, or otherwise interested therein, *at least ten days previous to the time designated in such notice for the presentation of such petition.* Such service shall be made by delivering a copy of such notice to each of the persons or parties so named therein, if a resident of the state; or in case of the absence of such person or party from his or her usual place of abode by leaving a copy of such notice at his or her usual place of abode; or in case of a foreign corporation, at its principal place of business in this state, with some person of more than sixteen years of age. In case of domestic corporations, such service shall be made upon the president, secretary, or other directors or trustee of such corporation. In case of minors or (on) their guardians, or in case no guardian shall have been appointed, then on the person who has the care and custody of such minor. In case of idiots, lunatics, or distracted persons, or their guardian; or in case no guardian shall have been appointed, then on the person in whose care or charge they are found. In case the land, real estate, premises, or other property sought to be appropriated is (state, school) or county land, the notice shall be served on the auditor of the

county in which the land, real estate, premises, or other property sought to be appropriated is situated. *In all cases where the owner or person claiming an interest in such real or other property is a non-resident of this state,* or where the residence of such owner or person is unknown, and an affidavit of the agent or attorney of the corporation shall be filed that such owner or person is a non-resident of this state, or that, after diligent inquiry, his residence is unknown, or cannot be ascertained by such deponent, *service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks;* and in case no newspaper is published in said county, then such publication may be had in a newspaper published in the county nearest to the county in which lies the land sought to be appropriated. *And such publication shall be deemed service upon each of such non-resident person or persons whose residence is unknown.* Such notice shall be signed by the president, manager, secretary, or attorney of the corporation; and in case the proceedings provided for in this article are instituted by the owner or any other person or party interested in the land, real estate, or other property sought to be appropriated, then such notice shall be signed by such owner, person, or party interested, or his, her, or its attorney. Such notice may be served by any competent person over twenty-one years of age. Due proof of service of such notice, by affidavit of the person serving the same, or by the printer's affidavit of publication, shall be filed with the clerk of such superior court before or at the time of the presentation of such petition. Want of service of such notice shall render the subsequent proceedings void as to the person not served; but all persons or parties

having been served with notice as herein provided, either by publication or otherwise, shall be bound by the subsequent proceedings. In all other cases not otherwise provided for, service of notices, order, and other papers in the proceedings authorized by this article may be made as the superior court, or the judge thereof, may direct. (Cf. L. '88 p. 58, Sec. 2; L. '90, p. 295, sec. 2; 2 H. C., Sec. 649)

* * * * *

Sec. 925. *Court to Adjudicate Necessity for Appropriation.—Calling Jury.* At the time and place appointed for hearing said petition, or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises or other property described in said petition, have been duly served with said notice as above prescribed, and shall be further satisfied by competent proof that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really a public use, or is for a private use for a private way of necessity, and that the public interest requires the prosecution of such enterprise, or the private use is for a private way of necessity, and that the land, real estate premises or other property sought to be appropriated are required and necessary for the purposes of such enterprise, the court or judge thereof may make an order, to be recorded in the minutes of said court, directing the sheriff to summon a jury. (Cf. L. '88, p. 60, sec. 4, L. '90, p. 297, sec. 4; 2 H. C., sec. 651; L. '97, p: 63, sec. 1)

Sec. 927. *Judgment and Decree of Appropriation—At the time of rendering judgment for*

damages, whether upon default or trial *if the damages awarded be then paid, or upon their payment, if not paid at the time of rendering such judgment, the court, or judge thereof, shall also enter a judgment or decree of appropriation of the land, real estate, premises, right of way, or other property sought to be appropriated,* thereby vesting the legal title to the same in the corporation seeking to appropriate such land real estate, premises, right of way, or other property for corporate purposes. Whenever said judgment or decree of appropriation shall affect lands, real estate, or other premises, a certified copy of such judgment or decree of appropriation may be filed for record in the office of the auditor of the county where the said land, real estate, and with like effect. If the title to shall be recorded by said auditor like a deed of real estate, and with like effect. If the title to said land, real estate, premises, or other property attempted to be acquired is found to be defective from any cause, the corporation may again institute proceedings to acquire the same, as in this article provided. (Cf. L. '90, p. 298, sec. 6; L. '91, p. 84 sec. 1; 2 H. C. sec. 653.

Sec. 929. *Payment to Petitioner—On Appeal Money to Remain in Court...Upon the entry of judgment upon the verdict of the jury,* or the decision of the court, or judge thereof, awarding damages, as hereinbefore prescribed, *the petitioner,* or any officer of or any other person duly appointed by said corporation, *may make payment of the damages assessed* the parties entitled to the same, *and of the costs of the proceeding, by depositing the same with the clerk of said superior court,* to be paid out under the direction of the court, or judge thereof *and upon making such payment into the court of the dam*ages assessed and allowed, and of the costs to any

land, real estate, premises, or other property mentioned in said petition, such corporation shall be released and discharged from any and all further liability therefor, unless upon appeal the owner, or other person or party interested, shall recover a greater amount of damages; and in that case, only for the amount in excess of the sum paid into said court, and the costs of appeal; provided, that in case of an appeal to the supreme court of the state by any party to the proceedings, the money so paid into the superior court by such corporation as aforesaid shall remain in the custody of said court until the final determination of the proceedings by the said supreme court. (L. '90, p. 299, Sec. 7; 2 H: C. Sec. 654.)

Pierce's Code 7549; Sec. 9219 Rem. Comp. Stat; Summons. Upon the filing of the petition aforesaid a summons, returnable as summons in other civil actions, shall be issued and served upon the person made parties defendant, together with a copy of the petition, as in other civil actions. And in case of any of them are unknown or reside out of the State, a summons for publication shall issue and publication be made and return and proof thereof be made in the same manner as is or shall be provided by the laws of the State for service upon absent defendants in other civil actions. Notice so given by publication shall be sufficient to authorize the Court to hear and determine the suit as though all parties had been sued by their proper names and had been personally served.

Pierce's Code, Sec. 8446. Sec. 233 Rem. Comp: Stat. Time and Manner of Service by Publication—Form. The publication shall be made in a newspaper printed and published in the county where the action is brought (and if there be no newspaper in the county, then in a newspaper printed and published in an adjoining county, and if there is no such newspaper in an adjoining county then in a newspaper printed and published at the capital of the state) once a week for six consecutive weeks. Provided, That publication of summons shall not be had until after filing of the complaint; and the service of the summons shall be deemed complete at the expiration of the time prescribed for publication as aforesaid. The summons must be subscribed by the plaintiff or his attorney or attorneys. The summons shall contain the date of the first publication, and shall require the defendant or defendants upon whom service by publication is desired, to appear and answer the complaint within sixty days from the date of the first publication of such summons; and said summons for publication shall also contain a brief statement of the object of the action. Said summons for publication shall be substantially as follows:

In the Superior Court of the State of Washington

for the County of.....

.....Plaintiff,

vs.

.....Defendant.

No.....

The state of Washington to the said (naming the defendant or defendants to be served by publication):

"You are hereby summoned to appear within sixty days after the date of the first publication of this summons, to wit, within sixty days after the..... day of....., I....., and defend the above entitled action in the above entitled court, and answer the complaint of the plaintiff....., and serve copy of your answer upon the undersigned attorneys for plaintiff,..... at his (or their) office below stated; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which has been filed with the Clerk of said Court. (Insert here a brief statement of the object of the action.)"

.....

Plaintiff's Attorney

P. O. Address:..... .....

County ..... Washington

Pierce's Code Sec. 1663; Sec. 4069 (2) Rem. Comp. Stat. SEAL: The county commissioners of each county shall have and use a seal for the purpose of sealing their procedings, and cop-

ies of the same when signed and sealed by the said county commissioners, and attested by their clerk, shall be admitted as evidence of such proceedings in the trial of any cause in any court in this State; and until such seal shall be provided, the private seal of the chairman of such board of county commissioners shall be adopted as a seal.

ARTICLE I OF THE CONSTITUTION OF THE STATE OF WASHINGTON

Sec. 2 SUPREME LAW OF THE LAND. The constitution of the United States is the supreme law of the land.

Sec. 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property without due process of law.

Sec. 16. EMINENT DOMAIN. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefore be first made in money, or ascertain-

ed and paid into Court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question and determined as such, without regard to any legislative assertion that the use is public.

In The United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARGARET ROSBOROUGH and ALICE BARBEE WICK,

Appellants,

vs.

CHELAN, COUNTY WASHINGTON, a municipal corporation,

Appellee.

No. 6429

And

ALICE BARBEE WICK, THEODORE S. TETTEMER and JANE DOE TETTEMER, his wife, (true Christian name unknown)

Appellants

vs.

CHELAN COUNTY, WASHINGTON, a municipal corporation,

Appellee

No. 6430

AFFIDAVIT OF MAILING OF BRIEFS

State of Washington
County of Spokane } ss.

I, CHARLES F. COWAN, being first duly sworn, depose and say that I am one of the attorneys of record for appellants in the above-entitled causes, now pending in the United States Circuit Court of Appeals for the Ninth Circuit wherein said persons are appellants and Chelan County, Wash., a municipal corporation, is appellee; that I served true and duly certified

copies of the appellants' Brief in said cases upon J. A. Adams and Sam M. Driver, attorneys of record in the said appeals for said appellee, by depositing in the United States Post-office at Spokane, Washington, on the .....day of August, 1931, two copies of said Brief, by registered mail, return receipt requested, special delivery postage fully prepaid, addressed to: "J. A. Adams and Sam M. Driver, Attorneys for Chelan County, Washington, Commercial Bank Building, Wenatchee, Washington," and the registered article receipt number ..... .hereto attached, was then and there issued to me by said post-office; and that on said.....day of August, 1931, I also mailed two copies of said Brief by ordinary mail to said attorneys, addressed to them as aforesaid, and with postage fully prepaid; that there is a regular mail communication between Spokane and Wenatchee, Washington.

CHARLES F. COWAN

Subscribed and sworn to before me this 11th day of August, 1931.

JAMES A. LYBECKER
Notary Public in and for the State of Washington, residing at Spokane

Notarial Seal
Commission Expires
May 16, 1933